

HOUSE BILL REPORT

2SHB 2452

As Passed House:
February 11, 2012

Title: An act relating to centralizing the authority and responsibility for the development, process, and oversight of state procurement of goods and services.

Brief Description: Centralizing the authority and responsibility for the development, process, and oversight of state procurement of goods and services.

Sponsors: House Committee on Ways & Means (originally sponsored by Representatives Wylie, Alexander, Kenney, Haigh, Hunt, Hudgins, Harris, McCoy, Ryu, Hasegawa, Springer, Billig, Maxwell, Upthegrove and Ormsby; by request of Department of Enterprise Services).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 1/19/12, 1/26/12 [DPS];
Ways & Means: 2/4/12, 2/7/12 [DP2S(w/o sub SGTA)].

Floor Activity:

Passed House: 2/11/12, 55-40.

Brief Summary of Second Substitute Bill

- Combines procurement statutes into a new chapter in Title 39 RCW.
- Charges the Department of Enterprise Services with oversight of state procurement of goods and services.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Hunt, Chair; Appleton, Vice Chair; Darneille, Dunshee, Hurst, McCoy and Miloscia.

Minority Report: Do not pass. Signed by 4 members: Representatives Taylor, Ranking Minority Member; Overstreet, Assistant Ranking Minority Member; Alexander and Condotta.

Staff: Marsha Reilly (786-7135).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government & Tribal Affairs. Signed by 16 members: Representatives Hunter, Chair; Darneille, Vice Chair; Hasegawa, Vice Chair; Carlyle, Cody, Dickerson, Haigh, Hudgins, Hunt, Kagi, Kenney, Ormsby, Pettigrew, Seaquist, Springer and Sullivan.

Minority Report: Do not pass. Signed by 11 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Orcutt, Assistant Ranking Minority Member; Chandler, Haler, Hinkle, Parker, Ross, Schmick and Wilcox.

Staff: Jeff Olsen (786-7175).

Background:

In 2011 laws were enacted consolidating procurement functions from the General Administration, the Department of Information Services, and the Office of Financial Management into the newly created Department of Enterprise Services (DES). The DES was tasked with effecting the reform and consolidation of state procurement practices and providing a report to the Governor with procurement reform recommendations by December 31, 2011. In doing so, the DES was directed to review national best practices and procedures used in other states and by the federal government.

Summary of Second Substitute Bill:

Laws relating to the procurement of goods and services are reorganized and recodified into a new chapter in Title 39 RCW. The processes for procurement of personal services contracts, or services, are combined with the processes for procurement of goods.

Definitions.

In addition to those in current use, definitions are clarified, and new definitions are added, as follows:

- "Bid" means an offer, proposal, or quote for goods or services in response to a solicitation.
- "Bidder" means an individual or entity who submits a bid, quotation, or proposal in response to a solicitation.
- "Contractor" means an individual or entity awarded a contract with an agency to perform a service or provide goods.
- "Debar" means to prohibit a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract during a specified period of time.
- "Goods" means products, materials, supplies, or equipment provided by a contractor.
- "Master contract" means a contract for specific goods or services, or both, that is solicited and established by the DES in accordance with procurement laws and rules on behalf of and for general use by agencies.

- "Microbusiness" means any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that: (a) is owned and operated independently from all other businesses; and (b) has a gross revenue of less than \$1 million annually as reported on its federal tax return or on its return filed with the Department of Revenue.
- "Minibusiness" means any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that: (a) is owned and operated independently from all other businesses; and (b) has a gross revenue of less than \$3 million, but \$1 million or more annually as reported on its federal tax return or on its return filed with the Department of Revenue.
- "Services" means labor, work, analysis, or similar activities provided by a contractor to accomplish a specific scope of work.

Director's Authority.

The Director of the DES (Director) is responsible for the development and oversight of policy for the procurement of goods and services by all state agencies including standards for the use of credit cards; purchase of goods and services from Washington small businesses; microbusinesses and minibusinesses; food procurement and food contracts; criteria for vehicle purchases; and implementation of an enterprise system for electronic procurement. The Director has the sole authority to enter into master contracts on behalf of the state. The Director also has the authority to delegate authorization to purchases goods and services to agencies. Such authorization must specify restrictions as to dollar amount or specific types of goods and services, based on a risk assessment process and does not exempt the agency from conformance to the policies established by the Director.

Training.

The DES must provide expertise and training on best practices for state procurement. Training or certification programs, or both, must be established and state agency employees responsible for procurement must complete the training or certification programs beginning July 1, 2013, and by July 1, 2015, no agency employee may execute or manage contracts unless the training and certification requirements have been met.

Competitive Solicitation.

All contracts for purchases of goods and services must continue to be based on a competitive solicitation process, which may include electronic or web-based solicitations, bids, and signatures. Exemptions from competitive solicitation, such as emergency contracts, sole source contracts, and direct buy purchases, are continued and new exemptions are allowed, including purchases from master contracts; contracts determined by the Director as not appropriate or cost-effective for competitive solicitation; intergovernmental agreements awarded to any governmental entity; and contracts for services necessary to the conduct of collaborative research if it is a condition of granting funds.

Protests and Complaints.

Agencies with procurement authority must develop clear and transparent complaint and protest processes. A complaint process allows for the complaint to be submitted and a response provided before the deadline for bid submissions. A protest process must include a protest period after the apparent successful bidder is announced but before the contract is

signed. The Director may grant authority for an agency to sign a contract before the protest process is completed under exigent circumstances.

Procurement Management.

The DES must adopt uniform policies and procedures for the effective and efficient management of contracts by all state agencies. At a minimum, the policies and procedures must include:

- pre-contract procedures for selecting potential contractors based on their qualifications and ability to perform;
- model complaint and protest procedures;
- alternative dispute resolution processes;
- incorporation of performance measures and measurable benchmarks in contracts;
- model contract terms to ensure contract performance and compliance with standards;
- executing contracts using electronic signatures;
- criteria for contract amendments;
- post-contract procedures; and
- procedures and criteria for terminating contracts for cause or otherwise.

Agencies may not enter into a contract under which the contractor could charge additional costs for access to data generated under the contract. A contractor must provide access to data generated under the contract to the agency. "Data" includes all information that supports the findings, conclusions, and recommendations of the contractor's reports, including computer models and the methodology for those models.

Disclosure of Bid Documents.

Records related to state procurements are public records. Bid submissions and bid evaluations are exempt from disclosure until the announcement of the apparent successful bidder.

Sweat-Free Procurement Policy.

The DES must develop a sweat-free procurement policy and code of conduct that provides that apparel, garments and corresponding accessories, equipment, materials, and supplies purchased by state agencies be produced in workplaces free of sweatshop conditions. Such contracts shall require the contractor to agree to comply with these provisions before the contract is awarded. Sweatshop labor is defined as "all work or service extracted from or performed by any person in violation of more than one law of the country of manufacture governing wages, employee benefits, occupational health, occupational safety, nondiscrimination, or freedom of association."

Performance-Based Contracts.

Agencies, to the extent practicable, should enter into performance-based contracts that identify expected deliverables and performance measures or outcomes. Performance-based contracts may include, but are not limited to, either consequences or incentives or both to ensure that the agreed upon value to the state is received. Payment for goods and services under performance-based contracts should be contingent on the customer achieving performance outcomes.

Convenience Contracts.

The DES may, in accordance with procurement laws and rules, establish a convenience contract for specific goods or services on behalf of and for use by a specific agency or group of agencies.

Bonds.

Once a bid has been accepted, an agency may require the successful bidder to submit a bond to the agency in an amount and with surety or sureties determined by the agency. Bidders who regularly do business with the state shall be permitted to file an annual bid bond in an amount established by the agency. An annual bid bond shall be acceptable as surety in lieu of furnishing surety with individual bids. Agencies may also require performance bonds, protest bonds, or other bonds deemed necessary.

Debarment.

The Director of the DES has the authority to debar any contractor based on a finding of one or more of the following causes:

- conviction of a criminal offense as an incident to obtaining a public or private contract or subcontract, or in the performance of such contract;
- conviction under state or federal law for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty;
- conviction under state or federal antitrust laws arising out of the submission of bids or proposals;
- two or more violations within the previous five years of the Federal Labor Relations Act;
- violation of contract provisions of a character regarded by the Director to justify debarment action, including deliberate failure without good cause to perform the contract, or a recent record of failure to perform or of unsatisfactory performance with the terms of one or more contracts;
- violation of ethical standards; or
- any other serious or compelling cause to affect responsibility as a state contractor, including debarment by another governmental entity.

A decision to debar must be issued by the Director in writing and must state the reasons for the action taken, and must inform the debarred contractor of his or her rights to judicial or administrative review.

Ethics.

The ethics laws that apply to all state officers and employees relating to limitations on gifts also applies to contractors who provide goods and services for, or on behalf of, the state. Any person or entity who seeks or may seek a contract with a state agency may not give, loan, transfer, or deliver to any person something of economic value that would cause a state officer or employee to be in violation of ethics laws pertaining to assisting in transactions, compensation for official duties or nonperformance, compensation for outside duties, gifts, or limitation on gifts.

Transparency.

Agencies must provide on an annual basis a list of all contracts that the agency has entered into or renewed. The DES must maintain a list of all contracts entered into by agencies.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date: The bill takes effect on January 1, 2013.

Staff Summary of Public Testimony (State Government & Tribal Affairs):

(In support) The states spends upwards of \$1 billion on goods and services annually. The laws have been modified over the years so that agencies may purchase outside a contract when it is less expensive. This bill consolidates and streamlines the process. It requires competition with limited exceptions, provides a website with contract information, allows for electronic submittals, and requires training on best practices.

The procurement statutes were examined from nine other states as well as federal statutes. A survey was sent to a large constituency. The bill consolidates statutes under the DES which will help streamline the processes. Vendors and purchasers agreed that more training is needed and the DES will develop those protocols. The survey indicated that improved competition is needed

The bill should be expanded in scope in terms of transparency. From an employee perspective, the bill addresses transparency in terms of the awarding of bids. Contractors must be accountable for the products that they deliver. The bill addresses consistency in contracting out, but does not include performance measures of any value. The provisions of the bill should save the state millions of dollars. If it were amended to include public works contracts, even more money could be saved. Debarment should be more flexible. This will move purchasing in this state in the right direction. A quick-pay system should be offered to help with cash flow problems for small businesses.

(In support with amendments) There is a concern that best-value criteria be more explicit. Agencies should monitor and determine how things are made by considering working conditions. There are nine states that have passed sweatshop-free criteria.

(Opposed) None.

Staff Summary of Public Testimony (Ways & Means):

(In support) The DES is working hard to control the costs to implement the consolidation of purchasing into one chapter. The regulation of contracts will focus on sole source contracts, not competitively bid contracts. The DES will provide training and information technology support to help agencies implement the bill. The goal is to develop one training track, and the bill should help agencies achieve efficiencies. The reporting requirements will increase transparency and could result in millions of dollars of savings per year. Holding contractors responsible should lead to cost savings.

(In support with amendments) Higher education institutions seek to amend the bill to align thresholds to make the bill cost neutral.

(Opposed) None.

Persons Testifying (State Government & Tribal Affairs): (In support) Representative Wylie, prime sponsor; Joyce Turner and Tim Gugerty, Department of Enterprise Services; Heidi Robbins Brown, Health Care Authority; and Frank Lemos, Office of Minority and Women's Business Enterprises.

(In support with amendments) Dick Meyer, Washington Fair Trade Coalition and South Sound Clean Clothes; Chris Mulick, Council of Presidents; and Alia Griffing, Washington Federation of State Employees.

Persons Testifying (Ways & Means): (In support) Tim Gugerty and Roselyn Marcus, Department of Enterprise Services; and Alia Griffing, Washington Federation of State Employees.

(In support with amendments) Margaret Shepherd, University of Washington.

Persons Signed In To Testify But Not Testifying (State Government & Tribal Affairs): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): None.